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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT CHAVIRA,

Defendant and Appellant.

D049286

(Super. Ct. No. SCD198803)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed.

Robert Chavira entered negotiated guilty pleas to receiving stolen property (Pen. Code, § 496, subd. (a))¹ and attempting to dissuade a witness (§ 136.1, subd. (b)(1)). He admitted a prior serious felony conviction (a strike) (§§ 667, 1170.12, 668) and serving a prior prison term (§§ 667.5 subd. (b), 668). The plea agreement included a

¹ All statutory references are to the Penal Code unless otherwise indicated.

lid of seven years and Chavira waived the right to have a jury determine whether aggravating facts supported the upper term at sentencing. (*Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); see *Cunningham v. California* (2007) 127 S.Ct. 856 (*Cunningham*).) The record does not include a certificate of probable cause. (Cal. Rules of Court, rule 8.304(b).)

FACTS

Viewing the record in the light most favorable to the judgment below (*People v. Johnson* (1980) 26 Cal.3d 557, 576), the following occurred. On March 3, 2006, police responded to a reported disturbance on Caninngton Drive. They stopped Chavira who was speeding away from the scene. Chavira was arrested and police found on his person a Rolex watch that had been stolen in a robbery of a Carlsbad jewelry store. The reporting party told officers that Chavira had threatened to kill his girlfriend. He threatened to kill the reporting party when she tried to call police. In 2001, Chavira was convicted of robbery (§ 211) and was sentenced to prison. Because Chavira entered guilty pleas, he cannot challenge the facts underlying the convictions. (§ 1237.5; *People v. Martin* (1973) 9 Cal.3d 687, 693.) We need not recite the facts in greater detail.

DISCUSSION

Appointed appellate counsel has filed a brief setting forth the evidence in the superior court. Counsel presents no argument for reversal but asks this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to as possible but not arguable issues: (1) whether Chavira was advised of his rights and the consequences of his guilty

pleas and waived his rights before he entered the guilty pleas; (2) whether there is an adequate factual basis for the guilty pleas; (3) whether the trial court abused its discretion in refusing to strike the prior strike; (4) whether sufficient reasons supported imposition of the upper term; and (5) whether Chavira was entitled to have a jury determine whether aggravating facts supported the upper term.

We granted Chavira permission to file a brief on his own behalf. He has not responded. We requested additional briefing on the issue of whether Chavira's *Blakely* waiver was expressed in open court (*Blakely, supra*, 542 U.S. 296). In *Blakely* and *Cunningham* (*Cunningham, supra*, 127 S.Ct. 856), the United States Supreme Court held that a defendant has a right to a jury determination as to any sentencing factors that may be used to increase his sentence to the upper term. The parties have responded to our request and the People correctly pointed out that absent a certificate of probable cause, Chavira cannot challenge the constitutionality of the sentence on appeal.

Absent a certificate of probable cause, a defendant can challenge the validity of a guilty plea on appeal only on the ground that the trial court erred in denying a motion to suppress evidence or that raises "issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed." (*People v. Buttram* (2003) 30 Cal.4th 773, 780; § 1237.5.) Chavira argues that he is not challenging the validity of the plea agreement that contains a seven-year lid on the sentence but is merely challenging the sentence imposed. However, in *People v. Shelton* (2006) 37 Cal.4th 759, 763 (*Shelton*), the California Supreme Court said: "inclusion of a sentence lid implies a mutual understanding and agreement that the trial court has

authority to impose the specified maximum sentence and preserves only the defendant's right to urge that the trial court should or must exercise its discretion in favor of a shorter term." In *Shelton*, the defendant claimed imposing sentence on both a stalking conviction and making a criminal threat conviction violated Penal Code section 654. The Supreme Court held *Shelton* could not raise the issue on appeal absent a certificate of probable cause because a challenge to the trial court's authority to impose a sentence within the lid is a challenge to the validity of the plea, requiring a certificate of probable cause.

(*Shelton, supra*, 37 Cal.4th at p. 771.) Because a challenge to the constitutionality of the court determination regarding aggravating factors is a challenge to the trial court's authority to impose the maximum sentence permissible under the plea agreement, it is a challenge to the plea agreement and cannot be reviewed on appeal absent a certificate of probable cause. In *People v. Bobbit* (2006) 138 Cal.App.4th 445, like here, the defendant entered a negotiated guilty plea in exchange for dismissal of charges and a sentencing lid. Like Chavira, Bobbit did not seek a certificate of probable cause. On appeal, Bobbit challenged the upper term as violative of *Blakely*. The reviewing court applied the principle expressed in *Shelton, supra*, 37 Cal.4th 759, to dismiss the appeal. The reviewing court concluded that the plea agreement did not preserve on appeal the issue that the court did not have authority to impose an upper term sentence in the absence of a jury and, absent a certificate of probable cause, the defendant could not challenge the sentence as violating *Blakely*. The same is true here.

A review of the entire record pursuant to *People v. Wende, supra*, 25 Cal.3d 436, including the possible issues referred to pursuant to *Anders v. California, supra*, 386 U.S.

738, has disclosed no reasonably arguable appellate issue. Competent counsel has represented Chavira on this appeal.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

McDONALD, J.